SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 160.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
an unincorporated association,
Petitioner,

v.

CENTRAL OF GEORGIA RAILWAY COMPANY,
a corporation,
Respondent.

PETITIONER'S REPLY BRIEF.

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The brief filed on behalf of Central of Georgia Railway Company in opposition to the Brotherhood's petition for a writ of certiorari acknowledges that the application filed by Southern Railway Company with the Interstate Commerce Commission on December 15, 1960, sought authority from the Commission merely to purchase a block of the common stock of the Central of Georgia Railway Company with a view to acquiring control over the management of the Central of Georgia Railway. In respondent's "Statement of the Case," at page 2 of its brief, respondent says:

> "The case began on December 15, 1960, when Southern Railway Company filed an application with the Commission under Section 5(2) of the Interstate Commerce Act for authority to acquire stock control of respondent Central of Georgia Railway Company."

Again at page 10 of its brief respondent says:

"The type of transaction involved here is a stock acquisition."

Yet the gist of respondent's argument opposing the granting of certiorari is that in the course of hearings held by the Hearing Examiner, Southern Railway's intentions with respect to consolidating its yard and terminal facilities with those operated by the Central of Georgia Railway were described by Southern Railway's witnesses; and, in addition, the Examiner, and later the Commission, gave consideration to the effects that "the proposed transaction" * would have on Southern's and Central's employees, and, according to respondent, the Commission conditioned its approval of Southern's application by imposing "a thorough-going system of conditions designed to compensate employees who would be adversely affected by the proposed consolidations." †

What Southern Railway's application to the Commission disclosed regarding the effect that its "proposed transaction" with the Central of Georgia Railway Company would have on the employees was stated as follows:

"(v) *Employee Protection.* The proposed transaction will not have any adverse effect upon employees of applicant. Applicant is unable to say at this time just what effect the proposed transaction will have on employees of Central, but it is possible that certain employees of Central might be adversely affected." (Page 13 of Application of Southern Railway Company.)

The respondent, on the basis of these considerations, arrives at the conclusion that the Commission's order

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* Page 4 of respondent's brief.

† Page 6 of respondent's brief.

actually authorized Southern Railway to consolidate its yard and terminal facilities with the yard and terminal facilities owned and operated by the Central of Georgia Railway. Says the respondent at page 13 of its brief:

> "It is thus clear that the yard consolidations involved in the case at bar were authorized by the Commission."

We suggest that the respondent's explanation of the purpose and the effect of the evidence presented to the Commission disclosing Southern Railway's plans for the consolidation of switching yards and terminal facilities, and the general effect that such consolidations would have on Southern Railway employees and on Central of Georgia employees, is not a correct explanation of the purpose such evidence was intended to serve. Southern Railway has, in fact, proceeded since the issuance of the Commission's order on December 5, 1962, as if Southern Railway and the Central of Georgia Railway had applied to the Commission under Section 5(2)(a) for authority "to consolidate or merge their properties or franchises," and the Commission had in fact approved an application of that nature.

If the proceeding before the Commission was for the purpose that is now claimed by the respondent, the proceeding was in part a deception and ought not receive judicial approbation, such as was accorded it by the Court of Appeals for the Fifth Circuit. We say the proceeding tended to be deceptive because Southern Railway's application to the Commission does not disclose that it sought authority to do more than acquire stock control of the Central of Georgia Railway Company. Furthermore, the introduction of evidence disclosing Southern Railway's plans for the consolidation of yard and terminal facilities served an essential purpose, but it was a purpose other

than that attributed to it by the respondent. That purpose was to justify Southern Railway's desire to acquire control over the management of the Central of Georgia Railway Company. When one railroad corporation seeks to acquire control over the management of another railroad corporation through the ownership of corporation stock, the Congress has put upon the acquiring corporation the burden of demonstrating that the establishment of a single management over two railroad systems is consistent with the public interest.

There is manifestly not one but several methods by which the establishment of a single management over two railroad systems—particularly two competing systems—could bring about changes in their methods of operation that would be either consistent with or beneficial to the public interest. The consolidation of yard and terminal facilities of the two systems could, under certain circumstances, be one such method. Hence, such plans as Southern Railway had for consolidating or merging its yard and terminal facilities with those operated by the Central of Georgia Railway could tend to justify establishing a single management over the operation of the two railroads. Testimony on this subject would therefore provide support for Southern Railway's application to the Commission for permission to acquire a controlling block of Central of Georgia Railway Company stock. The actual consolidation or merger of the yards and terminal facilities of the two carriers is a development that might follow, for good reason, long after permission to establish a joint or single management had been obtained from the Commission.

The respondent commits a second error when it contends, in effect, that the fact that the Commission imposed protective conditions for the benefit of employees proves

that the Commission authorized Southern Railway to consolidate or merge its yard and terminal facilities with the yard and terminal facilities owned and operated by the Central of Georgia Railway Company. The respondent says at page 12 of its brief—

> "If the Commission's authorization had been limited to the bare acquisition, there would have been no occasion to prescribe employee protection."

Such reasoning is patently unsound. If the managements of two railroad systems that have been competing for business over substantially the same geographical area become subject to one management, there is a variety of ways by which economies in railroad operations could be effected, with a resulting shrinkage of jobs, without the railroads consolidating or merging their yard switching and terminal facilities or without abandoning lines of track or making other changes in operating methods for which specific authority from the Commission need first be obtained under Section 1(18), or Section 5(1), or Section 5(2) of the Interstate Commerce Act.

For example, office facilities and office personnel of the two carriers could be combined. Service shops and the shop crafts could be combined and streamlined into more efficient arrangements. The practice of competing for traffic in communities served by both carriers could be moderated by reducing the number of trains in operation without detracting from the essential service needed by a community or without running afoul of the prohibitions contained in Section 5(1) of the Interstate Commerce Act.*

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* Section 5(1) requires carriers to obtain from the Commission approval of agreements for the pooling or division of traffic, or of service, before such agreements may be made effective.

In all such undertakings there is virtual certainty that there will be a reduction in the number of persons employed or that there will be a shifting of their places of employment, and, hence, there will be occasion to impose protective conditions for the benefit of employees. It is doubtlessly due to such considerations that the Congress was persuaded to enact paragraph (f) of Section 5(2) of the Interstate Commerce Act, with the result that the Commission is required to condition its approval of an application by one carrier to acquire control over another carrier, through ownership of its stock, by imposing upon the carrier's plan "a fair and equitable arrangement to protect the interests of the railroad employees affected."

Hence, the respondent is simply in error when it asserts that the fact that the Commission imposed protective conditions for the benefit of employees at the time that it approved Southern Railway's application is proof that the Commission also authorized the two carriers "to consolidate or merge their properties or franchises."

In light of the contention that the Central of Georgia Railway has asserted throughout this litigation—that contention being that the Commission not only authorized Southern to acquire a controlling interest in the stock of the Central of Georgia Railway Company but that the Commission also granted Southern authority under Section 5(2)(a) of the Interstate Commerce Act to consolidate or merge its yard and terminal facilities with the yard and terminal facilities owned by Central of Georgia—one question begs for answer.

That question is this: What purpose or motive caused Southern Railway to limit the application it filed with the Commission to obtaining authority merely to purchase a controlling interest in the stock of Central of Georgia Railway Company?

If Southern Railway wanted greater advantages or greater freedom of action in assimilating and absorbing the Central of Georgia railway system into its own railway system than could legitimately be accomplished by acquiring control, through ownership of stock, of Central of Georgia Railway Company, why did not Southern Railway's application to the Commission set forth frankly and forthrightly its desire and its plans to consolidate or merge its railroad properties and franchises with similar facilities and franchises owned by the Central of Georgia Railway? The authority that the Commission's order granted to Southern Railway, to the extent that any authority is specifically spelled out by the order, reads as follows:

> "It is further ordered, that, subject to conditions set forth in said report, as amended by the immediately preceding paragraph hereof, the acquisition by the Southern Railway Company of control of the Central of Georgia Railway Company and of the latter's common carrier subsidiaries, through ownership of a majority of the capital stock of the Central of Georgia Railway Company, in the manner and upon the terms and conditions in the report aforesaid found just and reasonable, be, and it is hereby, approved and authorized:"

The question that Southern Railway has never answered, does have an answer. We suggest that the answer is that Southern Railway followed the path of least public resistance to its objectives. It confined the application that it filed with the Commission to a statement of the *minimum objective* for which it needed Commission approval. In that manner the burden of justifying its objectives was kept to a minimum. Public interest in the transaction, and employee opposition to the transaction, was only mildly aroused by Southern's declaration that the only authority that it sought from the Commission was authority to pur-

chase a block of common stock of the Central of Georgia Railway.

We suggest that not only the employees' welfare but also the public interest as well will be better served if the Court grants certiorari in the instant case and rules that when a carrier seeks authority from the Interstate Commerce Commission to acquire control in any form over the management, or over property and franchises of another carrier, the Interstate Commerce Act contemplates that the carrier's application to the Commission shall contain a full disclosure of the carrier's intentions, and the authority that the carrier seeks from the Commission shall be spelled out with particularity. Had these requirements been observed in the instant case, Southern Railway's application to the Commission would have disclosed to the organizations representing the Central of Georgia's employees, and to the public, the fact that the two carriers had developed plans that were ready for execution, pursuant to which Central of Georgia Railway would cease performing its yard switching services at Atlanta, at Macon, and at Chattanooga, and that it would discharge its employees working at those terminals.

CONCLUSION.

The petitioner prays that its petition for a writ of certiorari be granted.

Respectfully submitted,

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